

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION**

BRANDON P. SMITH

PETITIONER

V.

NO. 4:19-CV-122-DMB-JMV

STATE OF MISSISSIPPI, et al.

RESPONDENTS

ORDER

Brandon Smith's petition for a writ of habeas corpus is before the Court on the Report and Recommendation of United States Magistrate Judge Jane M. Virden. Doc. #13.

**I
Procedural History**

On August 20, 2019, Brandon P. Smith filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Doc. # 1. On October 15, 2019, the respondents filed a motion to dismiss. Doc. # 9. Smith responded to the motion on October 24, 2019. Doc. # 11. The respondents filed an untimely reply on November 13, 2019. Doc. # 12.

On November 18, 2019, United States Magistrate Judge Jane M. Virden issued a Report and Recommendation recommending that the respondents' motion to dismiss be granted and that Smith's petition for a writ of habeas corpus be dismissed as untimely filed. Doc. # 13. No objections to the Report and Recommendation have been filed, and the deadline for filing objections has passed.

**II
Analysis**

Under 28 U.S.C § 636(b)(1)(C), "[a] judge of the court shall make a de novo determination of those portions of the report ... to which objection is made." "[W]here there is no objection, the Court need only determine whether the report and recommendation is clearly erroneous or contrary

to law.” *United States v. Alaniz*, 278 F.Supp.3d 944, 948 (S.D. Tex. 2017) (citing *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir. 1989)). Because the Court has reviewed the Report and Recommendation and found no clear error, it will be adopted as the order of the Court and the petition dismissed as untimely filed.

III **Certificate of Appealability**

Rule 11 of the Rules Governing § 2254 Proceedings for the United States District Courts requires a court to “issue or deny a certificate of appealability when it enters a final order adverse to the applicant.” A certificate of appealability (“COA”) will issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). For cases rejected on their merits, a movant “must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong” to warrant a COA. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). To obtain a COA on a claim rejected on procedural grounds, a movant must demonstrate “that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Id.* at 484. Based on the *Slack* criteria, the Court finds a COA should not issue in this case.

IV **Conclusion**

The Report and Recommendation [13] is **ADOPTED**; the motion to dismiss [9] is **GRANTED**; and the petition for a writ of habeas corpus [1] is **DISMISSED** as untimely filed.

SO ORDERED, this 6th day of December, 2019.

/s/Debra M. Brown
UNITED STATES DISTRICT JUDGE